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NO. 85-5571

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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SUPREME COURT, U.S.

JAMES E. MESSER, JR.,

Petitioner,

v.

RALPH M. KEMP, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

I.

Did the Eleventh Circuit Court of Appeals properly apply the standards of this Court set forth in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984), in evaluating Petitioner's claim of ineffective assistance of counsel at the sentencing phase?

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PART ONE

STATEMENT OF THE CASE

Petitioner, James E. Messer, Jr., was indicted by the grand jury of Polk County, Georgia, during the November Term, 1979 for kidnapping with bodily injury and for the murder of Rhonda Tanner. A special plea of insanity (incompetency to stand trial) was filed on behalf of the Petitioner. After subsequent psychiatric examinations concluded that Petitioner was mentally competent and criminally responsible, the special plea of insanity was withdrawn. Following a trial by jury, Petitioner was found guilty on both charges and was sentenced to the death penalty on both offenses. A motion for a new trial was denied and a notice of appeal was filed.

On direct appeal the Supreme Court of Georgia considered six issues presented by the Petitioner and also considered the validity of the death sentences imposed. The court affirmed

both convictions and sentences. Messer v. State, 247 Ga. 316, 276 S.E.2d 15 (1981). Petitioner's motion for rehearing was denied by the Supreme Court of Georgia on March 18, 1981.

Petitioner subsequently filed a petition for a writ of certiorari in this Court challenging the denial of an independent psychiatric examination, the denial of the motion for a change of venue and the denial of the motion for a mistrial. Said petition was denied by this Court on October 5, 1981. Messer v. Georgia, ___ U.S. ___, 102 S.Ct. 367 (1981).

Petitioner next filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, on January 5, 1982. That court denied relief without a hearing on February 23, 1982. The application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on April 20, 1982. This Court denied a petition for a writ of certiorari on October 4, 1982.

The instant federal petition for a writ of habeas corpus was filed in the United States District Court for the Northern District of Georgia on November 23, 1982. An evidentiary hearing was held before United States Magistrate Joel M. Feldman on August 5, 1983. On February 1, 1984, the magistrate entered a report and recommendation recommending that relief be denied as to the conviction, but suggesting that relief be granted as to the sentencing phase, finding that counsel was ineffective during the closing argument at the sentencing phase. Both parties filed objections to the report and recommendation. On March 30, 1984, the district court entered an order adopting all portions of the magistrate's report and recommendation except for that portion dealing with the effectiveness of counsel at the sentencing phase. The district court concluded, without reaching the question of the effectiveness of counsel, that Petitioner had failed to show any prejudice resulting from this allegation. The district court ruled on certain issues that had not been addressed by the initial report and recommendation as well. The application

for a certificate of probable cause was denied by the district court, but granted by the Eleventh Circuit Court of Appeals on June 1, 1984.

Subsequently, a panel of the Eleventh Circuit Court of Appeals affirmed the decision of the district court denying habeas corpus relief. Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1985). A petition for rehearing was filed on behalf of the Petitioner which was denied on August 23, 1985. Petitioner has now filed the instant petition challenging the decision of the Eleventh Circuit Court of Appeals.

PART TWO

STATEMENT OF FACTS

On the morning of February 13, 1979, eight-year-old Rhonda Tanner went to College Street Elementary School in Cedartown, Georgia. Normally, Rhonda rode the bus to and from school; however, that afternoon at approximately 2:30 p.m., James Messer, Rhonda's uncle, picked her up at school. (T. 204, 202). Petitioner was driving a 1976 Pontiac with the license tag RUP-779. (T. 367). Petitioner told the school principal, Sam Brabson, that Rhonda's father was injured at his construction job and that the victim's mother sent the Petitioner to pick up the little girl. Rhonda left the school with the Petitioner and was not seen again.

When Rhonda did not get off the school bus that afternoon, her mother became worried and drove to the school looking for her. (T. 156, 207, 218). Mr. Brabson told Mrs. Tanner what had transpired earlier and described the Petitioner. Mrs. Tanner contacted her mother-in-law who in turn called the police and also called Petitioner's wife. Petitioner's wife stated that she did not know of any reason why the Petitioner would pick up Rhonda. (T. 158).

Petitioner's sister-in-law, Pamela Dunn, was at the Messer home early that evening. Ms. Dunn testified that Petitioner came in the door cursing, stating that he had been at the doctor's office all day. Petitioner went straight to the bathroom and changed his clothes. (T. 242). In reference to Rhonda's disappearance, Ms. Dunn asked the Petitioner what could be wrong with Rhonda. Petitioner responded, "I don't know and I don't give a damn." (T. 243).

The next day Ms. Dunn was driving down Old Mill Road and spotted Rhonda's coat lying in some bushes near the railroad tracks. Ms. Dunn notified the police. (T. 246). Law enforcement officials later found Rhonda's blood-covered body in a wooded area near the railroad tracks off Old Mill Road.

There was evidence of a lot of movement in the brush surrounding the body. Authorities also found Rhonda's books, slacks and panties nearby.

Dr. Byron Dawson of the State Crime Lab testified as to the condition of the victim's body. The victim's face, neck, upper chest and buttocks were covered with contusions, lacerations and abrasions. The abrasions and contusions surrounding the eyes were consistent with hard blows by a fist. (T. 462). Wounds on the right side of the face and forehead were consistent with the sole of a shoe. (T. 468-469). There was also bruising on the shoulders, collar bone, front throat and left arm. Scratches were found on the victim's right arm and lower legs. (T. 464-465). There were six stab wounds to the body; some of the wounds had abrasions around the wounds where the knife handle had actually hit the victim's body. There were also five knife slashes across the victim's abdomen. The cause of death was determined to be internal loss of blood secondary to the stab wounds. Swabs taken from the victim's abdomen and vaginal area indicated the presence of sperm. (T. 440).

The police conducted an investigation and interviewed several witnesses from the school and other individuals. This investigation led the police to the Petitioner. The investigation also revealed that on February 13, 1979, Robin Slides was driving down Old Mill Road at approximately 3:35 p.m. and noticed a Pontiac parked on the side of the road near the railroad tracks. A few minutes later Slides saw a man walk from the railroad tracks to the car. (T. 231, 232). The following day, Slides reported the incident to police and identified Petitioner's car. (T. 234, 235).

Retha Wood, an employee at Barber's Service Company, testified that on the morning of February 13, 1979, Petitioner came into the store inquiring about light fixtures and supplies. (T. 164, 165). Mrs. Wood was alone in the store at that time. Petitioner insisted that Mrs. Woods go to the back

storeroom to get the supplies he needed, but she refused. Mrs. Wood called her husband to the store because she was afraid. Petitioner left the store, but returned later thinking Mrs. Wood was alone. Mr. Wood appeared from the back of the store and the Petitioner again left the store. At approximately 2:30 p.m., Mrs. Wood saw Petitioner drive by the store and look in the window. Mrs. Wood wrote down the Petitioner's license tag number which was RUP-779. (T. 169). According to Mrs. Wood, the Petitioner was headed in the direction of College Street Elementary School which was located a few blocks away from her store. That night Mrs. Wood reported the Petitioner and a description of his car to the police. Mr. and Mrs. Wood later identified a photograph of the Petitioner. (T. 172, 175, 185, 187).

Witnesses who saw the Petitioner on February 13, 1979, identified the Petitioner as wearing a red cap, blue jeans and a tan jacket. On the evening of February 14, 1979, Brabson and two other witnesses from College Street Elementary School identified a photograph of Petitioner as the man who took Rhonda from school on the preceding day.

At approximately 6:00 p.m. on February 14, 1979, G.B.I. Agent Jerry Longino, F.B.I. Agent Leary and Cedartown Police Officer Dean went to a trailer on Rockmart Highway to talk with Petitioner. Petitioner agreed to follow the officers to the Cedartown Police Station where he voluntarily gave a statement and signed a waiver to search his house. Petitioner was not under arrest at the time. The statements made by the Petitioner were later admitted at trial after a Jackson v. Denno hearing. After the confession the Petitioner was arrested.

Initially the Petitioner denied killing Rhonda, but when confronted with the fact that witnesses had identified him, Petitioner broke down crying and admitted the murder. (T. 359, 360, 366-8). Petitioner stated that on February 13, 1979, he tried to pick up a female employee at Barber's Service Company

without success, so he drove to College Street Elementary School to get Rhonda. Petitioner stated that when he picked up Rhonda at school, he had planned to molest her, but not to kill her. Petitioner told Brabson that he came to pick up Rhonda because her father had been hurt on his job. (T. 341, 369, 401). Petitioner and Rhonda drove down by Old Mill Road to a deserted wooded area near the railroad tracks. Petitioner told Rhonda that he wanted to play a game and the two walked into the woods. Petitioner began to molest Rhonda. When she resisted, the Petitioner beat and stomped her head with his fist and shoe. Petitioner admitted that he stabbed Rhonda with a knife six times and slashed her abdomen. Petitioner also admitted pulling down his pants and masturbating, but denied having sex with the victim. Petitioner stayed in the woods with the victim approximately thirty minutes. (T. 386, 403).

Petitioner returned to his car and threw away Rhonda's books and coat. Petitioner stated that he washed off his knife and threw his cap in a creek behind Old Mill Restaurant. Petitioner showed the officers the knife he used in the killing and also showed the officers a bruise on his right foot where he had kicked the victim.

Police recovered a red cap from the creek behind Old Mill Restaurant. The State Crime Lab conducted tests on various portions of evidence and found that hair having a common origin with the Petitioner was in the red cap and also on a sheet used in transporting the victim's body. A plaster cast made of a footprint found near the victim's body was consistent with Petitioner's shoe. (T. 429). Tests made on Petitioner's shoe and knife suggested the presence of blood. Blood found on Petitioner's blue jeans was found to be the same type as that of the victim. (T. 434).

Further facts will be developed as necessary for a more thorough explanation of the issues presented by the instant appeal.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THE STANDARD OF THIS COURT IN STRICKLAND V. WASHINGTON, ___ U.S. ____, 104 S.CT. 2052 (1984), IN RESOLVING PETITIONER'S ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE.

In the instant petition, Petitioner challenges the Eleventh Circuit's resolution of his allegation of ineffective assistance of counsel at the sentencing phase. Although Petitioner had previously challenged the effectiveness of his counsel at trial, Petitioner apparently is not presenting that issue as an allegation before this Court, but is focusing on the sentencing phase allegation. Respondent submits that the Eleventh Circuit Court of Appeals properly applied the standards of this Court in Strickland v. Washington, supra, and that no reason exists for this Court to grant a petition for a writ of certiorari.

The allegation concerning the effectiveness of trial counsel was first presented to the state habeas corpus court. That court specifically found that Petitioner did receive effective assistance of counsel at trial. When the issue was raised in the district court, as no hearing was held in the state courts, a hearing was ordered before the magistrate. The magistrate heard evidence from Petitioner, his trial counsel as well as other witnesses. The magistrate found, "counsel investigated and interviewed those prospective witnesses in mitigation whose names had been furnished him, and made a tactical decision to limit such witnesses to the applicant, applicant's mother and applicant's Aunt Essie Messer, rejecting others for tactical reasons. . . . At the presentence hearing,

he was only able to call the applicant's mother because the applicant refused to testify, and Essie, although present earlier, failed to return to court." (R. 428). The magistate also found that counsel met with the Petitioner's mother several times to prepare for her testimony. Counsel made a decision not to tell Petitioner's mother specifically what to say and told her not to tell the jury that she and the Petitioner were reconciled to his receiving the death penalty. (R. 428). The magistrate credited the testimony of trial counsel regarding his preparation for the sentencing phase and concluded that the portion of the allegation relating to counsel's failure to present evidence at the sentencing phase was without merit. The magistate did find counsel ineffective based on the closing argument at the sentencing phase. When the district court considered this allegation, the district court concluded, in relation to the closing argument at the sentencing phase, that Petitioner had failed to show the requisite prejudice. The court considered the question in light of the evidence and the totality of the performance of trial counsel and found that there was no actual and substantial prejudice. (R. 477). The court did not decide whether the argument itself was ineffective.

On reviewing the allegation, the Eleventh Circuit Court of Appeals considered the allegation of the effectiveness of counsel at the sentencing phase. In regard to the assertion that counsel failed to present available witnesses, the court noted "that an attorney's actions, including his decision to put a particular character witness on the stand, is given great deference by this Court." Messer v. Kemp, 760 F.2d 1080, 1091 (11th Cir. 1985). The court found the following with regard to trial counsel's investigation of mitigating evidence:

> We have reviewed Sawhill's testimony from the state (sic) habeas proceeding. He thoroughly investigated Messer's background

> and was familiar with the mitigating evidence which was available. He was very much aware of the possible character witnesses and had spoken to most of them. Sawhill further indicated that he had every intention of calling some of these witnesses, but that for the most part, they appeared reluctant to testify on Messer's behalf. Faced with such a dilemma, we are not prepared to say that Sawhill's decision not to put these witnesses on the stand was unwarranted. See id. Even more importantly, we have reviewed the mitigating factors which were to have been introduced by these witnesses, and we find that they do not even begin to tip the balance of aggravating and mitigating circumstances in favor of Messer.

Messer v. Kemp, supra, 760 F.2d at 1091.

The court further found that there was no merit to the allegation that Sawhill failed to prepare the Petitioner's mother to testify. The court noted that Mr. Sawhill testified he discussed the testimony with Mrs. Messer on several occasions and specifically testified that he instructed her not to mention that her son was anticipating the death penalty. The court concluded that the Petitioner had failed to show that Sawhill's performance during the sentencing phase was deficient under the standard of Strickland v. Washington, supra. The court concluded, "even if we accept that some of Sawhill's specific actions fell outside the wide range of reasonable professional assistance, we nonetheless are convinced that under the totality of the circumstances, they in no way affected the ultimate outcome of the guilt or sentencing phase of this trial." Id. at 1092.

In Strickland v. Washington, supra, this Court set forth the standards to be applied in evaluating claims of ineffective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id., 104 S.Ct. at 2064. This Court found that the same principle applied to a capital sentencing proceeding. Furthermore, a defendant must show that counsel's performance was deficient, that is, show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Furthermore, a defendant must also show that the deficient performance prejudiced the defense by showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. In order to prevail on the first prong of the test, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." Id. at 2065. Judicial scrutiny is also highly deferential in examining counsel's performance. The court should avoid the inclination to second-guess counsel after the fact.

In examining an allegation of prejudice, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 2067. This Court resolved the question of prejudice by concluding that a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 2068. In the context of a sentencing proceeding the question is "whether there is a reasonable probability that, absent the errors, the sentencer -- including the appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of

aggravating nd mitigating circumstances did not warrant death." Id. at 2069. "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id. at 2069.

It is clear from a review of the opinion of the Eleventh Circuit Court of Appeals that that court applied the standard set forth by this Court in Strickland v. Washington, supra. It is further clear that that court made proper application of this constitutional standard in evaluating the allegation of ineffective assistance at the sentencing phase. As noted by that Court, counsel made certain strategic decisions as to how to proceed at the sentencing phase and such decisions were reasonable under the circumstance. Furthermore, Petitioner has simply failed to show that counsel's conduct was unreasonable under the facts and circumstances of this case. Finally, Petitioner has failed to show any prejudice sufficient to warrant reversal under the standards of Strickland v. Washington, supra, as Petitioner has not shown a reasonable probability that the outcome of the proceeding would have been different had counsel acted differently at the sentencing phase.

As the Eleventh Circuit Court of Appeals properly app'ied the standards set forth by this Court, there exists no constitutional question for review by this Court.

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that this Court deny the petition for a writ of certiorari filed on behalf of James E. Messer, Jr.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the bar of the Supreme Court of the United States and counsel of record for the respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for Respondent upon the Petitioner by depositing copies of same in the United States mail with proper address and adequate postage to:

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This 4th day of November, 1985.

MARY BETH WESTMORELAND
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